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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 234

314-645

OMAHA PACKING COMPANY,
Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Petitioner, Omaha Packing Company, respectfully shows:

A. Summary Statement of the Matter Involved.

Petitioner, plaintiff-appellant below (a Kentucky corporation), brought an action against respondents, defendants-appellees below (corporations of states other than Kentucky), which was removed to the United States District Court for the Northern District of Illinois, Eastern Division, to recover damages in the amount of $636,489.31 to

petitioner's meat packing plant and its contents from a fire which originated in a nearby grain elevator and spread to petitioner's plant as the result of a thirty-minute delay of a fire-boat proceeding to the fire, which delay was caused by the failure of respondents' (jointly operated) drawbridge to open on receiving the proper signal.[1] The jury returned a verdict for respondents. Judgment on the verdict was affirmed.

At the trial, petitioner introduced evidence showing the mechanical defect responsible for the failure of respondents' bridge to rise, but not the cause of that defect. Petitioner, contending that the doctrine of *res ipsa loquitur* applied, tendered a written instruction applying that doctrine, based on *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551. The trial judge refused to give the instruction, and told the jury, "* * * you should not base a verdict upon the proposition merely that because defendants' equipment failed that somebody connected with the defendants must pay for the damages ensuing. You must not jump at those conclusions regardless of any question of negligence. It would not be right for you to do that" (614).[2]

The Circuit Court of Appeals affirmed, holding that, though the doctrine of *res ipsa loquitur* was applicable to the failure of the drawbridge to rise on proper signal, proof by petitioner of the physical cause, as distinguished from the human cause responsible for the physical cause, of the failure of the bridge deprived petitioner of the benefit of the doctrine, and that the requested instruction was technically improper.

No question arises on the pleadings. The Circuit Court of Appeals properly found it unnecessary to state the evidence on questions of proximate cause and amount of dam-

1. For the underlying theory of the cause of action, see Appendix A (*infra*, p. 29).

2. Figures in parenthesis refer to pages of the printed record, unless otherwise stated.

ages (839), so in this petition, the statement will be confined to the evidence bearing on negligence.

Petitioner's plant was situated on the north bank of the south branch of the Chicago River, a navigable river (367), just west of Halsted Street. Immediately west, separated by from 85 to 156 feet of open ground, was the Quincy Elevator where the fire originated (268, Ex. 64, 653). Respondents' bridge crosses the river at Stewart Avenue, some 4,000 feet northeast of the west end of petitioner's plant (Ex. 23, 643). The bridge opened to permit the passage of boats by vertically lifting its 200-foot span to a height of 111 feet above the river (101). The bridge carried the two main line tracks of the Pennsylvania and Alton Railroads into the Chicago Union Station (415) over which passenger trains passed approximately every half hour (416). The bridge was operated by electric power by a lever man employed by respondents stationed in a shanty just off the bridge at its southeast corner (101). For the safety of passenger traffic, the lifting was regulated by an interlocking device controlled by seven levers, five of which were necessary to any operation, the functions of which were to set signals and derails against oncoming trains, pull plungers in the south and north ends of the bridge and make electric connections which gave power to the bridge operator to raise the removable span (101-102). If any one of the five levers could not be thrown, the bridge operator could not raise the bridge as he had no electric power.

The fire which caused the damage was discovered a few minutes before 3:28 P. M., Chicago Daylight Saving Time, on August 4, 1932 (270). At 3:28 P. M. the first alarm was received. An Acting Battalion Chief arrived, ordered a 4-11 alarm at 3:31 P. M. and a 5-11 alarm at 3:36 P. M. (176). These alarms brought out some 80 land fire companies, which succeeded in saving the north end (331) of

petitioner's plant (away from the river), but were unable effectively to fight the fire along the river front (97, 173), at which point it spread to petitioner's plant. Special alarms followed later (Ex. 22, 639).

The 4-11 alarm started the fire boat Graeme Stewart from its station at the foot of Franklin Street up the river to the fire (80). The boat was equipped with two powerful turret nozzles (75, 82), capable of throwing 9,000 gallons of water per minute (82), and was the equivalent of approximately ten land companies (75). The boat made a perfect run through 13 drawbridges, arrived at respondents' drawbridge and stopped at 3:45 P. M. (81, 105) because of the failure of the bridge to rise.

The lever man in the shanty had been informed by telephone of the approach of the fire boat at 3:37 P. M., and had prepared to make the lift but was unable to place No. 3 lever in normal position (103, 104). Petitioner called as witnesses, Pavelchick, defendants' lever man, and Chichocki, a signal maintainer employed by another railroad, whom the lever man had called to his assistance (101, 159). From their testimony, it developed that the failure of lever No. 3 to function was due to the fact that something was wrong in the lever box which contained the control mechanism operated by lever No. 3 (104, 160). This lever box was locked and sealed, and only certain trusted employees of respondent had keys to open it (390, 401). Certain parts of the control mechanism in it were connected by a round brass pin extending through openings in such parts. This pin was about two inches long and one-eighth of an inch in diameter and projected a short distance on either side of the connected parts (170). There was a small hole at each end of this pin into which a cotter key was inserted (163). The pin fit loosely enough so that it could revolve (405). The function of the cotter keys was to hold the pin in its proper place. Under the Illinois law, it is negligence not to spread

the free ends of a cotter key. *Rotche* v. *Buick Motor Co.*, 358 Ill. 507.

Pavelchik, after obtaining permission by telephone, broke the seal, opened the lever box, and tried to determine what was the matter (109, 110). Chichocki, after watching Pavelchik try to fix the apparatus (111), with the fire boat waiting outside, finally went over to the lever box (127), found the pin on the floor of the lever box, with a cotter key properly clenched in one end of the pin but no cotter key in the other end (165). He inserted the pin in the connected parts after bringing them into alignment (160) and told the lever man to raise the bridge. This was done (122). Chichocki's investigation and replacement of the pin took 2 to 4 minutes (160).

The fire boat was thus delayed from 3:45 to 4:16 (122) and arrived at the fire at from 4:22 to 4:25 (81-82). The numerical weight of the evidence indicated that the fire spread from the Quincy Elevator to the petitioner's plant between 3:51 and 4:01 P. M.[3]

Respondents introduced testimony of their signal man who installed the interlocking device. He said that if he opened lever box No. 3 and saw that the pin, from which the cotter key was missing, was out of its proper position, he would know why the lever failed to work electrically (413), and also that the interlocking device could have been picked by hand in a minute or two (409, 412). He also testified that lever box No. 3 was kept shut by a special Yale padlock made for this division of the Pennsylvania Railroad (389) and that the other employees besides himself who had keys to the lever box were the signal supervisor, the assistant

3. This statement summarizes the weight of the testimony of a large number of witnesses, viz.: Firemen McGrath (92), Gough (96), Lunn (172), Andrews (177), Burns (184), Grueneich (186), Love (187), Koller (191), Blair (193), Radke (195-6), Ford (200), Leahy (204), Butler (209), Larson (210), Hurst (219), Sulkowski (220), Felker (225), Martin (227), Lambert (236), McCurrie (239), Haberkorn (243), Cornell (247), Crane (252), Doyle (253), Conway (254), Maher (256), Semon (258), Dingels (259), Kemp (264), Gillespie (266), Smith (281), Geary (307), Daley (309), Johnson (310), Seemann (311), Scanlon (312), Walsh (490), Oelrich (495), Collins (497), Kennedy (499), Honan (499) and Morrison (509); and other witnesses, Johnstone (280), Nowicki (283), Mette (285), Koch (297-8), Schaack (301) and Sieger (324).

supervisor, the foremen, and the signal men, but no helpers (390). The chief engineer of the Union Switch and Signal Company, the manufacturer of the interlocking device, testified to its wide use (416) and testified as an expert that in his opinion, it was a safe and proper device for the purpose for which it was ordinarily intended, that is, to make it as safe as humanly possible to operate trains over the bridge (418-419). Heitz, a signal maintainer for the respondents, testified that it was a part of his regular duties to inspect the interlocking plant (420), that part of his inspection was to open lever box No. 3 and to look inside to see if the pin was inside and also the cotter keys (422). He testified that he inspected this lock a week before the fire in the Omaha plant and on that occasion he was sure that the cotter keys were in and "split" so they couldn't fall out (422, 428).

There was no evidence in the entire record that the missing cotter key, or broken fragments of it, were found in the lever box when it was opened or immediately thereafter, although the locked box was opened in the presence of respondents' employees (111).

The trial court held, and the Circuit Court of Appeals agreed, that the foregoing testimony eliminated petitioner's right to rely on the doctrine of *res ipsa loquitur*, and so justified the refusal (561, 600) to give petitioner's requested instruction No. VII [4] (770), based on that doctrine. Petitioner contends that this evidence fails entirely to show the responsible human cause—*i. e.*, the specific negligence, which resulted in the absence of the cotter key, that only proof of such responsible human cause would deprive petitioner of the benefit of the doctrine of *res ipsa loquitur*, that the requested instruction was proper, and that even if it were technically incorrect, the trial court should have given some proper instruction applying the doctrine of *res ipsa loquitur*.

4. Set out in full, *infra*, p. 24.

B. The Basis of the Court's Jurisdiction.

This Court may by certiorari have this cause certified to it for determination under the Act of February 13, 1925; 43 Stats. 938, Ch. 229 § 1; 28 U. S. C. A. § 347 amending and reenacting § 240(a) of the Judicial Code.

C. The Questions Presented.

Four questions, the answers to which will clarify the procedure in cases involving the doctrine of *res ipsa loquitur*, and one question as to the duty of a trial judge in giving or refusing instructions, are presented, viz.:

1. Whether, in a situation in which the doctrine of *res ipsa loquitur* would otherwise apply, a plaintiff who proves the physical cause of his injury, but not the human act or omission which resulted in the physical cause, is thereby deprived of the right to rely on the doctrine of *res ipsa loquitur*.

2. Whether there is any valid basis for a distinction, so far as the application of the rule of *res ipsa loquitur* is concerned, between cases involving a carrier-passenger relation, or an inherently dangerous agency on the one hand, and cases involving simple negligence on the other.

3. Whether in a *res ipsa loquitur* case, it is necessary for the evidence to exclude all other possible causes of the injury than defendant's negligence.

4. Whether an instruction on the subject of *res ipsa loquitur* must limit the permissible inference of negligence to the precise physical cause of the injury, or whether it may allow a general inference of negligence unless upon the whole evidence the inference is rebutted.

5. Whether a Federal trial judge to whom is tendered a technically defective instruction applicable to a material

point not otherwise covered may refuse the instruction without correcting it or substituting a proper one to cover the same subject matter.

D. The Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals decided (848-850) an important question of local law in a way probably in conflict with applicable local decisions, in holding that plaintiff's evidence of the precise physical (*i. e.*, mechanical) cause of an injury as distinguished from the human act or omission responsible for the mechanical cause is sufficient to deprive plaintiff of the right to rely on the doctrine of *res ipsa loquitur*.

North Chicago Street Ry. Co. v. *Cotton*, 140 Ill. 486, 494.

Chicago City Ry. Co. v. *Carroll*, 206 Ill. 318, 324-325.

O'Rourke v. *Marshall Field & Co.*, 307 Ill. 197, 200.

Bollenbach v. *Bloomenthal*, 341 Ill. 539, 546.

Masten v. *Cousins*, 216 Ill. App. 268.

2. The Circuit Court of Appeals decided (847) an important question of local law in a way probably in conflict with applicable local decisions, in holding that there is some difference between carrier-passenger situations and highly dangerous agency situations on one hand, and ordinary tort situations on the other, so far as the application of the doctrine of *res ipsa loquitur* is concerned.

North Chicago Street Ry. Co. v. *Cotton*, 140 Ill. 486, 494.

Chicago City Ry. Co. v. *Carroll*, 206 Ill. 318, 324-325.

Chicago City Ry. Co. v. *Barker*, 209 Ill. 321, 326.

3. The Circuit Court of Appeals decided (850) an important question of local law in a way probably in conflict with applicable local decisions in holding that, before *res ipsa loquitur* is applicable, the evidence must be such that negligence of the defendant is the only conclusion that can reasonably be drawn from the evidence as the cause for the damage.

Chicago City Ry. Co. v. *Barker*, 209 Ill. 321, 326.

Chicago Union Traction Co. v. *Giese*, 229 Ill. 260, 263.

4. The Circuit Court of Appeals decided (848-849) an important question of Federal law in a way probably in conflict with the applicable decisions of this Court in holding that the petitioner's requested instruction No. VII, if given, would have permitted an inference of negligence as to anything which occurred in connection with the inspection and maintenance of the bridge, and did not limit the inference of negligence to the cotter key, the Court thus ignoring the last clause of the requested instruction, "unless, upon the whole evidence, such prima facie evidence is rebutted."

Inland & Seaboard Coasting Co. v. *Tolson*, 139 U. S. 551.

5. The Circuit Court of Appeals decided (852) an important question of Federal law in a way probably in conflict with the decisions of this Court in holding that when the written requests for instructions on a material point not otherwise covered are technically defective, a Federal trial judge is under no independent duty to supply a correct instruction on that point.

St. Paul etc. Company v. *Bachmann*, 285 U. S. 112, 118.

Herron v. *Southern Pac. Co.*, 283 U. S. 91, 95.

Sprinkle v. *Davis*, 104 F. (2d) 487 (4 C. C. A.).

WHEREFORE, petitioner prays for the allowance of the Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause in order that said case may be reviewed and determined by this Honorable Court.

OMAHA PACKING COMPANY,
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Respondents.

BRIEF IN SUPPORT OF PETITION.

Reference to Report of Opinion Below.

This case in the District Court was not reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit has not yet been reported, but appears at pages 837-852 of the Record.

Grounds of Jurisdiction.

This Court has jurisdiction to order a Writ of Certiorari pursuant to the Act of February 13, 1925; 43 Stats. 938, ch. 229, § 1; 28 U. S. C. A. 347 amending and reenacting § 240 (a) of the Judicial Code.

Statement of the Case.

Because the case is fully stated there, reference is respectfully made to the "Summary Statement of the Matter Involved" in the Petition for Certiorari (*supra*, pp. 1-6, incl.) in support of which this brief is filed.

Errors to Be Urged.

1. The Court erred in holding that evidence of the physical cause of an injury is sufficient to deprive plaintiff of the right to rely on the doctrine of *res ipsa loquitur*, even though the responsible human cause (*i. e.*, the specific negligence) is not shown.

2. The Court erred in holding that there is a difference between the carrier-passenger situation and highly dangerous agency situation on the one hand and ordinary tort situations on the other so far as the application of the doctrine of *res ipsa loquitur* is concerned.

3. The Court erred in holding that the plaintiff tendered instruction No. VII based on the instruction approved by this Court in *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, would have permitted too broad an inference of negligence upon the facts of the case.

4. The Court erred in holding that in spite of the failure of the defendants to explain what had happened to the cotter key, the jury and the Court could speculate on the reason why it was missing without there being any burden on the defendants to explain the cause of its absence.

5. The Court erred in holding that a Federal trial judge is under no independent duty to supply correct instructions where requested instructions are technically defective.

ARGUMENT.

I.

To Deprive a Plaintiff of the Right to Rely on the Doctrine of Res Ipsa Loquitur, the Evidence Must Show More Than the Physical Cause of the Injury—It Must Show the Responsible Human Cause.

Since *Erie R. R.* v. *Tompkins*, 304 U. S. 64, the policy of Federal courts has been to endeavor to secure the same result from litigation in a Federal court as would be obtained from litigation in a state court, by applying all of the state rules of substantive law. Just as the incidence of burden of proof is a question of substantive law (*Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208), *res ipsa loquitur*, which affects the incidence of the burden of going forward with the evidence, is a question of substantive law, and so to be determined by local law.

Sierocinski v. *E. I. duPont etc. Co.*, 118 F. (2d) 531, 534-535 (3 C. C. A.).

F. W. Martin & Co. v. *Cobb*, 110 F. (2d) 159, 163 (8 C. C. A.).

Hagan and Cushing Co. v. *Washington etc. Co.*, 99 F. (2d) 614, 616 (9 C. C. A.).

Coca Cola etc. Co. v. *Munn*, 99 F. (2d) 190, 193 (4 C. C. A.).

The essence of this case is the ruling of the trial court and the Circuit Court of Appeals that proof of the precise mechanical or physical cause of an injury will deprive a plaintiff of his right to rely on the doctrine of *res ipsa loquitur* (844-847). We do not believe that the Illinois

courts would have applied that rule in the instant case.[5] No Illinois case holds that proof of the precise mechanical or physical cause of an accident will deprive a plaintiff of the right to rely on the doctrine of *res ipsa loquitur*. The language of the Illinois decisions is that it is evidence of "specific negligence" that deprives a plaintiff of that right. Thus in *Bollenbach* v. *Bloomenthal*, 341 Ill. 539, 546, the court in distinguishing another case says:

> "Thus specific negligence was shown and the doctrine of *res ipsa loquitur* does not apply where there is evidence of specific negligence."

And in *O'Rourke* v. *Marshall Field & Co.*, 307 Ill. 197, 200, the Illinois Supreme Court says of the doctrine of *res ipsa loquitur:*

> "It does not apply where there is evidence of specific negligence."

In the cases of *Chicago City Ry. Co.* v. *Carroll*, 206 Ill. 318, and *Masten* v. *Cousins*, 216 Ill. App. 268, the Court applied the doctrine of *res ipsa loquitur*, although the language of each opinion indicates that the Court felt that there was some evidence of specific negligence for the consideration of the jury.

The Supreme Court of Illinois in *Wheeler* v. *Chicago etc. R. R. Co.*, 267 Ill. 306, 321, adopted the words of Mr. Justice Holmes, in *Schlemmer* v. *Buffalo etc. R. Co.*, 205 U. S. 1, 12, as follows:

> "*Negligence consists in conduct which* common experience or the special knowledge of *the actor* shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he *is held answerable for* that result although it was not certain, intended or foreseen." (Italics ours.)

So the law of Illinois, as of the Federal courts, makes

5. The great weight of authority supports the rule that neither proof of the precise physical cause of a plaintiff's injuries, nor an unsuccessful attempt by plaintiff to prove the specific negligence of the defendant, will deprive a plaintiff of his right. For list of authorities, see Appendix B (*infra*, p. 30).

human conduct rather than mechanical or physical conditions, the criterion of negligence.

To say, therefore, as the Circuit Court of Appeals does (846), that because the "precise cause" of the occurrence is shown by petitioner, the doctrine of *res ipsa loquitur* is not applicable (847), is to look only at the mechanical cause (the absence of the cotter key), not at the responsible human cause (what act or omission caused the absence of the cotter key), which alone is determinative of the question of negligence or non-negligence.

Every decision as to whether a defendant's conduct in particular circumstances is negligent involves two questions, viz: (1) exactly what did defendant's conduct consist of; or otherwise phrased—exactly what did defendant do or fail to do in the particular set of circumstances in question, and (2) was defendant's conduct such as complies with the legal standard of such care as a reasonably prudent man would exercise in similar circumstances? (Holmes, The Common Law, p. 122.) If the first question is answered beyond dispute, the second may be a question for the court, or for the jury. If reasonable men must agree that defendant's conduct in question is either a violation of, or a compliance with, the standard of care, the question is for the court. If reasonable men might disagree as to whether defendant's conduct in question was a violation of the legal standard of care, the jury must settle that point.

Restatement of Torts, § 285.
Holmes, The Common Law, pp. 122-123.

In a *res ipsa loquitur* case, the defendant's exclusive control of the instrumentality causing the damage and the fact that such damage does not occur in the ordinary course of things, if the one in charge of the instrumentality uses due care, unite in creating an inference of negligence, in the absence of a showing by defendant that his conduct in

the particular circumstances was not negligent. Where the facts of the case create this inference the jury should be told of it so that they may weigh the facts intelligently against the defendant's explanation.

Burdette v. *Chicago Auditorium Ass'n.*, 166 Ill. App. 186, 190.

Gleeson v. *Virginia Midland R. Co.*, 140 U. S. 435, 445.

Lowery v. *Hocking Valley R. Co.*, 60 F. (2d) 78, 79 (6 C. C. A.).

In the instant case, the facts obviously brought the case within the doctrine of *res ipsa loquitur* when the failure of the bridge to rise was shown, and this the Circuit Court of Appeals admits (844).

Petitioner made stronger proof, viz: that the failure of the bridge to rise was due to the fact that a cotter key was not present in a bronze wrist pin which connected two parts of the control mechanism inside a sealed lever box (165). At that point, the mechanical or physical cause of the failure of the bridge to rise was shown, but there was no light on the vital question of what was the responsible human act or omission which resulted in the absence of the cotter key from its proper position. Here the doctrine of *res ipsa loquitur* should apply, for certainly the absence of the cotter key from its proper position, in something so exclusively in respondents' control as the contents of a padlocked lever box, calls for explanation by respondents. Respondents' evidence was to the effect that the control machinery was standard equipment on American railroads, and that the lever box was inspected once each week, the last time a week before its failure. From these facts, respondents argued that the cotter key broke, and the Circuit Court of Appeals accepted this, saying (850):

> "We agree with the defendants that the most reasonable hypothesis is that it broke, some time subsequent to the last inspection, as a result of some defect not readily ascertainable by the inspector."

This explanation is negatived by the fact that if the cotter key had broken, *its fragments would have been on the floor of the locked lever box*, and respondents could have produced them to show that the breaking really happened, instead of having to argue it as the "most reasonable hypothesis." The failure to produce these fragments compels the acceptance of some other valid inference, the most probable of which is that some employee of respondents, having the key to the lever box, opened the box after its last inspection, removed the cotter key for some purpose and carelessly either (a) failed to place a new cotter key in the hole in the wrist pin, or (b) after placing a cotter key in the hole in the wrist pin, failed to clinch (spread the free ends of) the cotter key, either of which would be negligence under the laws of Illinois.

Rotche v. *Buick Motor Co.*, 358 Ill. 507, 515.

Chihocki saw a cotter key in the possession of Preston, respondents' employee, in the leverman's shanty after the bridge had gone up, but he could not say this cotter key was the one which was missing from the brass pin (170). Respondents did not (a) introduce any evidence that they could not produce the missing cotter key, (b) produce the missing cotter key or fragments thereof, or (c) put Preston on the stand.

Moreover, in *res ipsa loquitur* cases, the physical cause of the plaintiff's injuries is generally shown quite clearly by the evidence, and the question then becomes, what was the human act or omission which produced the physical cause, and was that act or omission a violation of the legal standard of care.

In *Byrne* v. *Boadle*, 2 H. & C. 722, the physical cause of plaintiff's injury was clear—a barrel of flour fell on him from an opening in defendant's warehouse. In *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435, the precise physical cause of the injury was shown—a landslide which derailed

a train. In *San Juan Light & Transit Co.* v. *Requena*, 224 U. S. 89, the precise physical cause of the death of plaintiff's intestate was shown—electric shock from defective converters. Yet in each of these cases, the doctrine of *res ipsa loquitur* was applied because the responsible human cause behind the precise physical cause was not shown.

In *Soto* v. *Spring Valley Water Co.*, 39 Cal. App. 187, the precise physical cause of the death of plaintiff's intestate was shown—the breaking of a chain which let the scoop of a steam shovel fall on him. In respect to the contention adopted by the Circuit Court of Appeals in this case, the court in the *Soto* case said (178 Pac. at 306) in part:

> "Defendant * * * contends that the *evidence showed the specific cause of the accident*, and that therefore the maxim may not be invoked, and certain authorities are cited which are claimed to support this contention. We think, however, that this question is foreclosed in this state by the doctrine of the case of *Lippert* v. *Pacific Sugar Corporation*, 33 Cal. App. 198, 164 Pac. 810. It may be added that in this case *the real moving cause of this accident is now shown. It is true that it appears that the scraper, for some reason, was dragged too far by the cable, thus wrecking the timbers, but this is only the result of some other cause, which must have been the underlying reason for the accident.* This underlying cause is not proven but it does seem to us that nothing could be clearer than that somebody's carelessness must have caused it." (Italics ours.)

In *Churchill* v. *Baltimore & O. R. Co.*, 30 F. Supp. 792, (D. C. W. D. Pa.) the evidence showed "that the brake rigging of the particular car which bumped into the car on which plaintiff was riding was defective, loose, and dangling, that a certain cotter pin that held up the brake rigging was missing" (30 F. Supp. at 792). But in spite of the particularity of this proof, the court in that case held that the doctrine of *res ipsa loquitur* applied.

Respondents' evidence in exculpation of its conduct is, in this case, entirely unsatisfactory. Not only did they fail to produce the "hypothetical" fragments of the missing cotter key, but the evidence was not as complete as respondents could have produced in other respects. Thus, respondents made no attempt to produce the lever men who were on duty when Pavelchik, a relief lever man (101, 156), was not. Respondents made no effort to prove that no employee of theirs went into lever box No. 3 subsequent to the time when Heitz made his last inspection prior to August 4, 1932, although if such were a fact, respondents could have made such proof by calling the lever men who were on duty other than at times when Pavelchik was on duty, or if necessary, by calling employees who had keys to the padlock on lever box No. 3 and ascertaining from each whether he had gone into the lever box between the time of the inspection by Heitz and the time of the occurrence in question. Respondents' studious non-production of this evidence, which was within its power to produce, justifies the inference that if respondents had produced the testimony it would not have helped their case.

Page v. *Keeves*, 362 Ill. 64, 73.

Interstate Circuit, Inc. v. *United States*, 306 U. S. 208, 226.

So the evidence neither showed what human conduct caused the absence of the cotter key, nor rebutted the inference of respondents' negligence.

The doctrine of *res ipsa loquitur* has never been more widely and usefully employed to promote justice than at the present time. In its opinion below, the Circuit Court of Appeals, by failing to observe the distinction between the precise physical cause of damages, and the responsible human cause (*i. e.*, the specific negligence), and holding that proof of the precise mechanical cause deprives the plaintiff of the right to rely on the doctrine, has seriously limited the doctrine of *res ipsa loquitur*, and drastically

impaired its usefulness at a time when its function in the judicial system is more than ever urgently needed, and limitations upon it consequently are most unfortunate. No Illinois case requires such a limitation—on the contrary, the language of the Illinois decisions cited negatives the limitations imposed by the Circuit Court of Appeals. This Court should take jurisdiction to correct this serious fallacy in the opinion of the court below.

II.

The Illinois Law Is That There Is No Difference, So Far as Application of the Doctrine of Res Ipsa Loquitur Is Concerned, Between Carrier-Passenger and Dangerous Agency Cases on the One Hand, and Simple Negligence Cases on the Other.

The Circuit Court of Appeals attempted to distinguish certain Illinois cases on the ground (847) that carrier-passenger cases and dangerous agency cases stand on some different basis, with respect to the doctrine of *res ipsa loquitur,* than ordinary torts cases. But that is an improper distinction according to the Illinois law, under which the case of a passenger injured by defective machinery or improper handling thereof, is simply one application of the doctrine of *res ipsa loquitur.* In *Chicago City Ry.* v. *Carroll,* 206 Ill. 318, 323, the Court said, speaking of the defendant's duty of explanation in carrier-passenger cases:

> "*It is the general recognized rule of this country and is one application of the rule of res ipsa loquitur.*" (Italics ours.)

And in *North Chicago Street Railway* v. *Cotton,* 140 Ill. 486, 494, the Court says, concerning the *res ipsa loquitur* doctrine:

> "* * * and this is held to be the rule even where no special relation like that of passenger and carrier, exists between the parties."

This is in accord with the general weight of authority.

Lee Line Steamers v. *Robinson*, 218 F. 559, 564 (6 C. C. A.).

Griffin v. *Manice*, 166 N. Y. 188, 193.

Southland Greyhound Lines v. *Frausto*, 69 S. W. (2d) 497, 499, 500 (Texas Civil Appeals).

3 Cooley on Torts, 4th Ed. p. 381.

Harper on Torts, p. 183.

In holding that there is a different basis for the doctrine of *res ipsa loquitur* in carrier-passenger cases than in other cases, the Circuit Court of Appeals clearly failed to apply the local law on a vitally important point.

III.

The Circuit Court of Appeals Erroneously Held That, in a Res Ipsa Loquitur Case, the Evidence Must Exclude Causes Other Than Defendant's Negligence.

The opinion of the Circuit Court of Appeals in this case adds to the confusion of the *res ipsa loquitur* decisions by holding (850) that the doctrine of *res ipsa loquitur* is inapplicable because the absence of the cotter key was as consistent with ordinary care as with negligence. In so holding, the Circuit Court of Appeals was confusing proof by circumstantial evidence with *res ipsa loquitur*. It is true that in proving an action for specific negligence by circumstantial evidence, the facts established must be such that negligence is the only conclusion than can reasonably be drawn from them. *United States etc. Co.* v. *Des Moines Nat. Bank*, 145 Fed. 273, 279 (8 C. C. A.; Van Devanter, *J.*) But in a *res ipsa loquitur* case, all that is necessary is for plaintiff to make a prima facie case, for the defendant has an opportunity to show that the accident occurred from a cause not due to his negligence. If this were not so, it would be impossible to justify the rule that a *res ipsa*

loquitur case "warrants, but does not compel," an inference of negligence (*Sweeney* v. *Erving*, 228 U. S. 233, 240). And so the cases which have seriously adverted to this point hold (contrary to the opinion of the Circuit Court of Appeals in this case), that it is not necessary, in a *res ipsa loquitur* case, for plaintiff's evidence to exclude all possibilities except defendant's negligence as a cause of the injury.

Cincinnati etc. R. Co. v. *South Fork Coal Co.*, 139 Fed. 528 (6 C. C. A.; Lurton, *J.*).

Clarke v. *Nassau El. R. Co.*, 9 App. Div. 51, 41 N. Y. S. 78, 80 (Cullen and Bartlett, *JJ.*).

Hubbert v. *Aztec Brewing Co.*, 26 Cal. App. (2d) 664, 80 P. (2d) 185, 1016, 1018.

To make a prima facie case under the *res ipsa loquitur* doctrine, it is sufficient to show that the instrumentality causing plaintiff's injury was in the exclusive control of the defendant, and that the "accident" was such as, in the ordinary course of things, does not happen if those in charge of the instrumentality use ordinary care (*Chicago City Ry. Co.* v. *Barker*, 209 Ill. 321, 326) and it then devolves upon the defendant to show that the injury occurred without any negligence on his part. It is not necessary to exclude all causes of the injury other than defendant's negligence, as in the circumstantial evidence cases.

IV.

Petitioner's Tendered Instruction No. VII Did Not Authorize the Jury to Draw Any Inference of Negligence Not Warranted by the Evidence.

The Circuit Court of Appeals also justified its affirmance of the trial court's refusal to give petitioner's requested instruction No. VII on the ground that it was too broad, and would have permitted "an inference of negligence * * * as to anything that occurred in connection with the inspection and maintenance of the bridge" (851). The Circuit Court of Appeals accepts, as the law of Illinois, that the inference of negligence under the doctrine of *res ipsa loquitur* is one of general and not of specific negligence (848), saying "The doctrine, however, raises an inference of general negligence with respect to the instrumentality (the bridge)". The Circuit Court of Appeals then arbitrarily ignored the limitation put on the inference of general negligence in the requested instruction by the following words "unless upon the whole evidence such inference was rebutted" (536). By the quoted words, the jury would have been told that they should refuse to draw the inference as to the machinery generally, or as to any part thereof, unless the inference was warranted by the whole evidence.

Petitioner's requested instruction No. VII was a paraphrase of the instruction approved by this Court in a *res ipsa loquitur* case—viz.:

> *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 554.

For the Court's convenience in comparing them, the instruction approved in the *Tolson* case, and petitioner's

requested instruction No. VII are set forth in parallel columns:

Petitioner's Instruction:

"It is admitted that the Stewart Avenue Bridge was, on the 4th day of August, 1932, in the control and management of the defendants. If the jury believe, from a preponderance of the evidence, that on said 4th day of August, 1932, said bridge failed to open promptly upon receiving a proper signal therefor from the fireboat Graeme Stewart, and that such failure to open promptly does not happen in the ordinary course of things, if those in charge of the management and operation of the bridge use ordinary care in connection with its inspection and maintenance, *this would be prima facie evidence of negligence on the part of the defendants under the circumstances and would justify the jury in so finding, unless upon the whole evidence, such prima facie evidence is rebutted.*" (536)

Instruction in Tolson Case:

"If the Jury believe from the evidence that the wharf in question was an ordinarily strong and good one, and suitable for the purpose for which it was constructed, and that, in making the landing in question, the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring, *this would be prima facie evidence of negligence on the part of the agents of the defendant under the circumstances* in making such landing *and would justify the jury in so finding unless upon the whole evidence such prima facie evidence is rebutted.*" (139 U. S. at 554. Italics ours.)

If *Inland etc. Co.* v. *Tolson*, 139 U. S. 551, is no longer a safe guide for counsel in framing instructions, this Court should expressly overrule it.

V.

A Federal Judge Is Not a Mere Moderator, and If the Only Instruction Requested on a Material Point Is Technically Defective, He Should Give a Correct One.

Finally, the Circuit Court of Appeals held (852) that a Federal court "is under no independent duty to supply correct instructions where requests are defective."

In *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95, Chief Justice Hughes said, "In a trial by jury in Federal Court

the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

In *St. Paul etc. Co.* v. *Bachman,* 285 U. S. 112, at 118, 119, this Court held that if instructions submitted on an issue were technically incorrect, but were sufficient to direct the trial court's attention to the particular point or issue, it was the trial court's duty to give a correct instruction on such point or issue. The Court cited a number of Circuit Court of Appeals cases in support of its decision, which upheld a different rule than that adopted by the Circuit Court of Appeals in the next to the last paragraph of its opinion in this case.

The duty of a Federal Judge under these circumstances is an extremely important question of Federal law. We submit that the decision of the Circuit Court of Appeals in this case is at variance not only with the decision of this Court in *St. Paul etc. Co.* v. *Bachman,* 285 U. S. 112, but with the decisions of the Circuit Courts of Appeal of the 3rd, 4th, 5th and 6th Circuits on this point.

Sprinkle v. *Davis,* 104 F. (2d) 487 (4 C. C. A.).

Audubon Building Co. v. *F. M. Andrews & Co.,* 187 F. 254, 260 (5 C. C. A.).

Memphis etc. Co. v. *Chapman,* 62 F. (2d) 565, 567 (6 C. C. A.).

Westchester Fire Ins. Co. v. *Fitzpatrick,* 2 F. (2d) 651, 654 (3 C. C. A.).

Sutherland v. *Payne,* 274 F. 360, 361 (6 C. C. A.).

Conclusion.

Twenty-eight years have passed since this Court last discussed the doctrine of *res ipsa loquitur* in *Sweeney* v. *Erving,* 228 U. S. 233. In that time, a tremendous number of decisions have been handed down by other courts re-

lating to this doctrine. During that period the wider use of machinery in industry, with the increase in injuries resulting therefrom, has correspondingly increased the importance of the doctrine. In cases of that type, the machinery causing the injury is in the exclusive control of the defendant, and the "accident" is such as does not happen in the ordinary course of things if those in charge of the machinery use due care. The injured plaintiff has little or no means of showing in what specific way the defendant's conduct was negligent, *i. e.*, what human act or omission started the chain of events resulting in his injury. The doctrine of *res ipsa loquitur* authorizes the jury to draw from those circumstances, in the absence of explanation, the inference that the defendant was negligent. The Illinois courts have applied the doctrine liberally to the fact situations presented to them, and often it is only plaintiff's ability to invoke that doctrine which enables him to secure the redress to which he is entitled.

The opinion of the Circuit Court of Appeals in this case has placed unwarranted limitations and restrictions upon the doctrine of *res ipsa loquitur* and the mechanics of its operation and has hopelessly confused the law by holding that a showing of the physical cause of an accident deprives a plaintiff of the right to rely on that doctrine; and the opinion below does not apply the Illinois law which requires a showing of specific negligence, viz.: a human act or omission responsible for the injury, before a plaintiff is deprived of the right to rely on the doctrine.

The Circuit Court of Appeals in its opinion in this case, both decided questions of local law in a way probably contrary to applicable local decisions and also decided important questions of Federal law in a way probably in

conflict with the decisions of this Court. For these reasons, this Court should exercise its discretion to issue its Writ of Certiorari to review this cause.

Respectfully submitted,

OMAHA PACKING COMPANY,
By JOHN S. LORD,
AUSTIN V. CLIFFORD,
Counsel for Petitioner.

APPENDIX A.

The Underlying Theory of the Case.

The underlying theory of this case is that if a person negligently obstructs a public thoroughfare over which he knows the fire department may be required to go to extinguish a fire, he is liable at common law for the damages caused by such negligent obstruction. A leading case on this point arose in Illinois,—*Houren* v. *Chicago, etc. Railway Company*, 236 Ill. 620 (1908). There a building adjacent to plaintiff's home was on fire. While the fire department was answering the alarm, one of defendant's freight trains, more than three blocks long, stopped across a public highway, preventing access of the fire apparatus to the fire for thirty minutes. (236 Ill. at 623.) During the delay, plaintiff's home caught fire and was damaged. A verdict for the plaintiff was affirmed.

In discussing the duty of care involved in such a case, the Supreme Court of Illinois said (236 Ill. at 625):

> "* * * appellant * * * contends that a prudent and experienced man, fully acquainted with all the circumstances which existed at the time the train was left upon the street, would not have thought it reasonable that the house in question would have been destroyed by fire as a consequence of the obstruction of the street, and that for this reason the damages are not such as could be recovered on account of the unlawful act in question. It is not necessary that the burning of this particular house could have been foreseen. It is only damages of the character of those which occurred, to-wit, damages by fire, that must have been within the range of the consequence of the act reasonably to be expected. It seems clear to us that if a prudent man of experience had reflected upon the probable consequences of entirely closing up this

> street in a great city he would have foreseen, first, that to so close the street would obstruct and delay public travel thereon; second, that among the travel liable to be so obstructed and delayed would be the passage of teams, engines and other appliances of the fire department; third, that if the travel of the fire department was so obstructed and delayed, any fire which the men of that department were seeking to reach would be more extensive and do greater damage than if the obstruction and delay had not taken place."

Just so, "a prudent man of experience" would, upon reflection, foresee the same possibilities in the event of the obstruction of the South Branch of the Chicago River by the failure to lift defendants' bridge, which would block the passage of a fire boat.

That the right of navigation over navigable waters is paramount, and that bridgetenders must explain any delay or obstruction of navigation, was established in *Clement* v. *Metropolitan El. Ry. Co.*, 123 F. 271 (7 C. C. A.; 1903). In that case the Circuit Court of Appeals for the Seventh Circuit said:

> "Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount." (123 F. at 273.)
>
> * * * * *
>
> "It was incumbent upon the appellee by his answer to set forth specifically for the information of the court the facts which prevented compliance with duty and which would excuse non-performance by alleging exculpatory facts, if any, showing that inability to perform a known duty arose from no neglect of its own. * * * Failing to raise the bridge promptly when it had ample notice of the approach of the vessel, the respondent must be held guilty of neglect of duty. Failing to show that the delay was unavoidable, the presumption of negligence attaches, which it was its duty to overcome." (123 F. at 274.)

APPENDIX B.

List of Authorities Holding That Evidence of the Precise Physical Cause of a Plaintiff's Injuries, or an Unsuccessful Attempt by Plaintiff to Prove the Specific Negligence of the Defendant Will Not Deprive Plaintiff of His Right to Rely on Res Ipsa Loquitur.

Chicago City Railway v. *Carroll*, 206 Ill. 318, 324-325.

Masten v. *Cousins*, 216 Ill. App. 268, 272.

Gleeson v. *Va. Midland Railway Company*, 140 U. S. 435.

San Juan Light & Transit v. *Requena*, 224 U. S. 89, 98.

Pennsylvania Company v. *Clark*, 266 Fed. 182, 187.

Neal v. *T. Eaton Co., Ltd.*, 1933-3 D. L. R. 306.

Rex v. *Canadian Tug Boat Co., Ltd.*, 1933 E. C. C. 104.

The Merchant Prince, 1892-P. D. 179 (Ct. of Appeals).

Partin's Admr. v. *Black Mountain Corp.*, 248 Ky. 32, 58 S. W. (2d) 234 (1933).

Kleinman v. *Banner Laundry Co.*, 150 Minn. 515, 186 N. W. 123, 124 (1921).

Colorado Springs, etc., Ry. Co. v. *Reese*, 69 Colo. 1, 169 Pac. 572, 575 (1917).

Kickels v. *Fein*, 104 Ind. App. 606, 10 N. E. (2d) 297, 301 (1937).

Shea v. *Hern*, 132 Me. 361, 171 Atl. 248, 250 (1934).

Union Gas & Electric Co. v. *Waldsmith*, 31 Oh. App. 118, 166 N. E. 588, 590 (1929).

Nashville, etc. R. Co. v. *Gregory*, 137 Tenn. 422, 193 S. W. 1053, 1055 (1917).

Dearden v. *San Pedro, etc., R. Co.*, 33 Utah 147, 93 Pac. 271, 273 (1907).

Humphrey v. *Twin State Gas & Electric Co.*, 100 Vt. 414, 139 Atl. 440, 445 (1927).

Highland v. *Wilsonian Investment Co.*, 171 Wash. 34, 17 Pac. (2d) 631, 633 (1932).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 234

OMAHA PACKING COMPANY,

Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,

Respondents.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSITION TO PETITION FOR CERTIORARI.

FREDERIC D. MCKENNEY,
SILAS H. STRAWN,
FRANK J. LOESCH,
JOHN D. BLACK,
EDWARD M. BURKE,
DAVID L. DICKSON,
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Respondents.

OPPOSITION TO PETITION FOR CERTIORARI.

Reference to Report of Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit has been reported since the filing of the petition herein. It appears in 120 Fed. (2d) 594.

Statement of the Case.

Petitioner's statement of the case (Pet. 1-6, 12)* is inaccurate and incomplete in the respects hereinafter stated.

Petitioner has attempted to argue the weight of the evi-

* The petition for Writ of Certiorari and accompanying brief, which are numbered consecutively, are herein referred to as "Pet.", followed by the page reference.

dence by presenting in its statement only its own version of the controverted issues. Petitioner states (Pet. 2) that the fire which destroyed its plant spread thereto "as the result" of the delay of the fire-boat caused by the failure of respondents' bridge to rise. The question of whether the spread of the fire was the result of this delay was one of the principal controverted issues on which the court and jury found against petitioner.

Petitioner states (Pet. 2) that it introduced evidence showing the mechanical defect responsible for the failure of respondents' bridge to rise, but not the cause of that defect. This is in contrast to petitioner's statement in the Circuit Court of Appeals, as shown by the opinion of that court. The Court of Appeals stated that the reason for the failure of the bridge to rise was not only proved by petitioner, but in its brief was conceded in the following statement (R. 844):

> "Plaintiff's evidence showed that the physical cause of the failure of the bridge to rise was the fact that a cotter pin had come out of one end of a bronze wrist pin. The latter had to be in its proper place in order for the interlocking control machinery to permit the bridge to rise. The absence of the cotter pin had permitted the bronze wrist pin to slip out of place. When an employee of another railroad replaced the bronze pin the bridge lifted. The control equipment in question was in a padlocked and sealed lever box which could only be opened by breaking the seal or by an employee having a key to the padlock."

Petitioner states (Pet. 2) that the Circuit Court of Appeals held that the doctrine of *res ipsa loquitur* was applicable to the failure of the draw-bridge to rise on proper signal. Although the grounds of the Court of Appeals' holding are of course immaterial, if its decision was correct, for the sake of accuracy it should be pointed out that the Circuit Court of Appeals specifically refused to decide whether the doctrine of *res ipsa loquitur* could have ap-

plied, stating (R. 844) that it assumed, without deciding, that on a record differing from the one here presented there might have been disclosed a situation wherein the doctrine would have been applicable. Furthermore, petitioner's statement of the Circuit Court of Appeals' holding is inaccurate in that it says (Pet. 2) that the court held that the refused instruction on *res ipsa loquitur* was "technically improper", whereas the court distinctly held that the instruction tendered by petitioner was defective in substance (R. 851), on the grounds that it was not applicable to the undisputed facts proved by petitioner; that it permitted an inference of general negligence covering the bridge as a whole, although the sole reason the bridge did not open promptly was the failure of a particular cotter key (R. 844); and that the mechanical failure under the facts proved was not such as to justify an inference of negligence (R. 849). In addition to the foregoing errors in substance, the instruction was bad in form, but the Circuit Court of Appeals did not rely on the objections as to form urged by respondents against the instruction (R. 851). The petitioner seems to concede (Pet. 24-25) that the instruction may have been bad in form. The Circuit Court of Appeals said that the trial court was justified in refusing a defective instruction and was under no duty to correct it (R. 852).

There is another respect in which petitioner's statement gives an entirely erroneous impression of the issues raised and litigated in the trial court. Petitioner's statement conveys the impression that petitioner's entire case turned on the *res ipsa loquitur* instruction in question (R. 770). The fact is that most of the issues of the case were based on alleged specific negligence, and that *res ipsa loquitur* was not clearly brought to the attention of the trial court until the instruction on that point was tendered. At the close of petitioner's case, the trial court asked the question directly of petitioner's counsel, whether petitioner was

relying on the doctrine of *res ipsa loquitur,* and petitioner's counsel refused to state that he was (R. 371). The extent to which the trial court was surprised by petitioner's later insistence on the application of *res ipsa loquitur* is indicated by the statement of the trial court in disposing of the motion for a new trial (R. 794), where the court said he did not hear much about this question during the trial, and that he was not even sure that plaintiff (petitioner) was going to rely on that doctrine in view of the many specific charges of negligence against defendants (respondents).

The statement (Pet. 5) that the numerical weight of the evidence indicated that the fire spread from the Quincy Elevator to the petitioner's plant between 3:51 and 4:01 P. M. is not supported by the record. Although the witnesses violently disagreed on the time at which the fire spread, the greater number of them fixed the time that it spread to petitioner's plant either before 3:51 or after 4:01 P. M.*

Respondents' evidence tended to show that the failure of the bridge to open promptly was wholly immaterial, because even if it had opened promptly the fireboat could not possibly have arrived at the fire before 3:51 P. M., and

* The following witnesses testified that the fire spread to petitioner's plant before 3:51 P. M.: Byrnes (R. 467); Hector (R. 473); McClaughry (R. 483); Oelrich (R. 492); Honan (R. 499); Morton (R. 515); Plant (R. 438); Langher (R. 461); Koopman (R. 465); Taylor (R. 482); Bragg (R. 503); Scott (R. 504); and Stocking (R. 510).

The following witnesses testified that the fire spread to petitioner's plant after 4:01 P. M.: Lunn (R. 172); Blair (R. 193); Gough (R. 96); McGrath (R. 92); Cornell (R. 247); Henry (R. 255); Martin (R. 227); Larson (R. 210); Andrews (R. 177); Doyle (R. 253); Hurst (R. 219); Butler (R. 209); Semon (R. 258); Gillespie (R. 266); O'Boyle (R. 237); Peterson (R. 309); Bailey (R. 207); Love (R. 187); McCurrie (R. 238); Haberkorn (R. 243); Sulkowski (R. 220); Flahive (R. 248); Evans (R. 74); Hohnsen (R. 202); Petrik (R. 257); Kemp (R. 264); Greune (R. 205); Dave (R. 181); Johnstone (R. 280); Koch (R. 297); and Schaack (R. 301).

it is apparent from defendants' Exhibit P (R. 454, 689), defendants' Exhibit R (R. 469, 693), and defendants' Exhibit S (R. 469, 695), which were parts of a photographic panorama taken between 4:01 and 4:06 P. M. (R. 453, 468), that the fire must have been in petitioner's plant long before the first mentioned time.

Petitioner makes the statement (Pet. 6) that there was no evidence in the entire record that the missing cotter key or broken fragments of it were found in the lever box when it was opened or immediately thereafter. This statement is inaccurate. One of the witnesses present when the box was opened, who testified that he himself made the repair, testified that he saw the missing cotter key after the bridge went up, lying on the desk. The actual testimony was as follows (R. 165):

> Q. "Did you see the one that was out at any time?"
> A. "I see him after the bridge go up, and I seen him laying on the desk. Mr. Preston called up there and the cotter pin was laying on the desk. That was the last time I see it."

This testimony was elicited by petitioner on direct examination, but petitioner did not ask any questions concerning the condition of the cotter key or what became of it.

Alleged Errors Urged by the Petitioner.

On the record made in this case, the petition for certiorari presents only one question:

Did the trial court commit reversible error when it refused to give the broad and general *res ipsa loquitur* instruction tendered by petitioner (R. 770)? That question necessarily turned upon the evidence in this particular case, and on the form and substance of said instruction. The undisputed evidence was that the only reason the bridge did not open promptly was the failure of a small cotter key. Also the instruction in question was incorrect

in substance and form. All other questions attempted to be presented by the petition are abstract questions which are both remote and argumentative, and are not presented by this record.

In No. 3 of the questions which petitioner attempts to present (Pet. 7), the question is stated to be whether in a *res ipsa loquitur* case it is necessary for the evidence to exclude all *possible* causes of the injury other than defendants' negligence. This language misstates the holding of the Circuit Court of Appeals. The holding of the Court of Appeals was that the doctrine of *res ipsa loquitur* is inapplicable where it can be reasonably said that the facts are as consistent with ordinary care as with negligence (R. 850).

In No. 5 of the questions which petitioner attempts to present (Pet. 7), petitioner assumes that its *res ipsa loquitur* instruction was only "technically defective." This brief will, we submit, show that the tendered instruction was seriously defective in both substance and form.

ARGUMENT.

I.

The Doctrine of Res Ipsa Loquitur Is Inapplicable to the Failure of the Bridge to Open Under the Facts in This Case.

There is only one question presented in this case, and that is a simple and concrete one: Whether the trial court committed reversible error in refusing to give a *res ipsa loquitur* instruction in view of the undisputed evidence that the only reason the bridge failed to open was the failure of a small cotter key, and in view of the errors contained in the instruction tendered by petitioner. The propriety of giving such an instruction must necessarily turn upon the evidence developed. The facts in this case are peculiar and a decision by this court on those facts would have little application to any other case.

In *Sweeney* v. *Erving*, 228 U. S. 233, this court said, page 240, that "*res ipsa loquitur* means that the *facts of the occurrence* warrant the inference of negligence, not that they compel such an inference; that they furnish *circumstantial evidence* of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient;" (Italics supplied).

The *Sweeney* case was not decided under Illinois law, which is different and less favorable to petitioner's contentions. Under Illinois law the doctrine of *res ipsa loquitur*, where applicable, creates a presumption which vanishes as soon as *any* contrary evidence is introduced.

> *Bollenbach* v. *Bloomenthal*, 341 Ill. 539, 542; 173 N. E. 670, 671. "The presumption or inference of negligence raised by the application of this doctrine

[res ipsa loquitur] is not absolute or conclusive but is rebuttable, and vanishes entirely when any evidence appears to the contrary."

Other decisions in Illinois have shown conclusively that under the law of that state it is not necessary that the contrary evidence furnish a complete explanation of the occurrence or point to the negligence of any person, but it is sufficient that the contrary evidence furnish some details of the physical occurrence alone. In the following cases the proof related only to the occurrence, not to the alleged negligent act responsible therefor, but the proof was held sufficient to make the said doctrine inapplicable

O'Rourke v. *Marshall Field & Co.*, 307 Ill. 197, 138 N. E. 625. The minor plaintiff was injured when a hand-hold on a rocking horse on which plaintiff was riding, and which was furnished by defendant, gave way. The only explanatory evidence was that the hand-hold was not securely fastened, with no proof as to who was responsible therefor. The court held the doctrine inapplicable because there was evidence of specific negligence.

Pennsylvania Company v. *Roberts & Schaefer Co.*, 250 Ill. App. 330. Plaintiff's employee was injured when a counterweight fell on him from a machine manufactured by defendant. The only evidence of the cause was that the set screw which should have held the counterweight slipped, without any proof as to who was responsible for the failure to fasten it securely, except that defendant offered proof that it had been securely fastened at the time of manufacture. The court held the doctrine of res ipsa loquitur inapplicable, because there was specific evidence as to how the accident occurred (p. 339).

Letush v. *New York Central Railroad Co.*, 267 Ill. App. 526. Plaintiff-passenger was injured when defendant's train was derailed because of a collision with an abandoned automobile on the track. There was no explanation as to how the automobile came to be there. The court held, p. 535, that in view of the evi

dence as to how the accident happened, the presumption of negligence under the doctrine of res ipsa loquitur vanished entirely.

Board of Trade v. *J. K. Company*, 290 Ill. App. 385, 8 N. E. (2d) 523. Plaintiff's employee was killed in an explosion in defendant's grain elevator. Defendant introduced extensive evidence of care and inspection, but there was no evidence as to how the explosion actually occurred, or what person, if any, was responsible therefor. The court held a res ipsa loquitur instruction shifting the burden of proof to defendant was reversibly erroneous.

Kerwin v. *Stonington Elevator Co.*, 291 Ill. App. 471, 10 N. E. (2d) 224. Plaintiff was injured when the wagon he was driving fell through a driveway over a bin in defendant's elevator. The drive could be rocked in order to dump the load. There was evidence of defendant's care but also evidence that the drive was out of position immediately after the accident. There was no explanation why the accident occurred, or what person was responsible for it. The court held the evidence sufficient to eliminate res ipsa loquitur.

We submit that under the foregoing cases the undisputed and detailed evidence in the present case, *largely introduced by plaintiff*, that the only reason the bridge failed to open was the failure of a small cotter key, completely eliminated the doctrine of *res ipsa loquitur*. Nevertheless, if the mere introduction of such undisputed and detailed evidence is insufficient to eliminate this doctrine, it is still true that negligence of defendants was not the more probable conclusion from all the evidence, and the doctrine therefore had no application.

It is the law of Illinois, as well as of the Federal courts and other jurisdictions, that negligence of defendant must be the more probable conclusion from all the facts in evidence, otherwise the doctrine of *res ipsa loquitur* does not apply.

Chicago and Eastern Illinois R. R. Co. v. *Reilly*, 212 Ill. 506, 510; 72 N. E. 454, 455. "The condition can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and the rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper."

Beckwith v. *Boynton*, 235 Ill. App. 469, 480.

Kraus v. *Becker, Ryan & Co.*, 265 Ill. App. 525, 533-534.

Sicrocinski v. *E. I. Dupont de Nemours & Company*, (C. C. A. 3rd) 118 Fed. (2d) 531, 536, (cited by petitioner, Pet. 13). "The thing of importance is that an inference exculpating the defendant from guilt could also be reasonably drawn from the evidence. That, of itself, is sufficient to prevent the application of *res ipsa loquitur* or the doctrine of exclusive control."

Interstate Circuit, Inc. v. *LeNormand* (C. C. A. 5th) 100 Fed. (2d) 160, 161.

Minneapolis General Electric Co. v. *Cronon*, (C. C. A. 8th), 166 Fed. 651, 659.

Wilson v. *Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329. "It is also to be observed that the doctrine [of *res ipsa loquitur*] will not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all;" (180 N. E. at p. 214).

What is the more reasonable or probable conclusion from the evidence in the instant case? The Circuit Court of Appeals concluded that the more reasonable hypothesis was that the small cotter key, measuring about ⅜" in length, broke sometime subsequent to the last inspection by defendants, as a result of some defect not readily ascertainable by the inspector (R. 850). The reason given by the Court of Appeals for this conclusion was that operation of

the bridge within less than half an hour prior to the failure, and the looseness with which the bronze pin fitted in the holes, clearly indicated that the bronze pin was in place within half an hour prior to the failure, but that it probably could not have stayed in place for the entire week since the last inspection without the cotter key (R. 849). The court said (R. 849): "It is an almost irresistible conclusion that the cotter key was absent for a very brief period prior to the time in question." There is no evidence in the record as to *where* the cotter key that failed was found immediately after the failure. The lever box consisted of a cover having a top and three sides which lifted up and off of a base consisting of a horizontal plane and the fourth side. The machinery within the lever box was attached to the horizontal plane and the fourth side. The cotter key could have fallen out of the lever box to the floor of the shanty. See picture of lever box, Defendants' Exhibit A (R. 400, 677). The cotter key that failed may have fallen from the lever box to the floor of the shanty when the cover was lifted from said lever box or it may have remained somewhere within the machinery. It may have been found somewhere within the machinery or on the floor of the shanty. It was later seen by Chichocki on the desk in the shanty (R. 165). The defendants' inspector inspected the cotter key a week before the occurrence and found it to be in good and proper condition and position. The bridge opened in the usual manner one-half hour before the occurrence. Thus the conclusion of the Court of Appeals was correct.

Petitioner advances another theory, which is entirely speculative and not in any manner sustained by the evidence (Pet. 17). The theory requires the assumption that an unknown employee of defendants entered the lever box and removed the cotter key which was there when the defendants' inspector inspected it a week previous to the

failure. There is no evidence in the record of the authority of an unknown employee of the defendants to enter the lever box. It follows that if such an unknown employee did enter the lever box, defendants would not be liable for his actions. Since petitioner has advanced no theory which would show defendants to be negligent, we submit that negligence of defendants was not the more reasonable conclusion from the undisputed facts, and therefore the doctrine of *res ipsa loquitur* had no application.

When all the evidence was in, including the uncontradicted evidence of periodical inspection by respondents, the undisputed fact was that the bridge did not open because of a failure in the cotter key, which had occurred subsequent to the last inspection. The undisputed evidence shows that the cotter key was in apparent good condition and position at the time of the last inspection. Its failure must therefore have been due to a latent defect. If such a latent defect was the cause, then the leading manufacturer from whom the machinery was purchased would be responsible, and not respondents.

O'Hara v. *Brown Hoisting Machine Co.* (C. C. A. 3rd), 171 Fed. 394.

Pettit v. *Board of Chosen Freeholders* (C. C. A. 3rd), 91 Fed. 998.

Herricks v. *C. & E. I. R. R. Co.*, 257 Ill. 264, 100 N. E. 897.

Southern Bell Telephone Company v. *Glawson* (Court of Appeals of Georgia), 79 S. E. 488.

Grand Rapids, etc. R. R. Co. v. *Huntley*, 38 Mich. 537.

Siegel v. *Detroit G. H. & M. Ry. Co.*, 160 Mich. 270, 125 N. W. 6.

Mooney v. *Beattie*, 180 Mass. 451, 62 N. E. 725.

Reynolds v. *Merchants Woolen Company*, 168 Mass. 501, 47 N. E. 406.

Shea v. *Wellington,* 163 Mass. 364, 40 N. E. 173.
Martin v. *Studebaker Corp.,* 102 N. J. Law 612, 133 Atl. 384.
Losee v. *Buchanan,* 51 N. Y. 476.
Ardesco Oil Co. v. *Gilson,* 63 Penn. St. 146.

The cases cited by petitioner on pages 17 and 18, commencing with *Byrne* v. *Boadle,* 2 H. & C. 722, all involve facts very greatly different from those in the present case, and the facts of those particular occurrences might have warranted an inference of negligence without any rule being established thereby for the present case. The most helpful case on the precise extent to which the explanation of the occurrence must go before *res ipsa loquitur* is excluded is of course the case closest on the facts. The case closest on the facts to the present case is *Buckland* v. *N. Y. N. H. & H. R. R. Co.,* 181 Mass. 3, 62 N. E. 955, where a breakage occurred in a railroad mechanism of almost exactly the same nature, and under almost exactly the same circumstances, as in the present case, and the court held that defendant railroad had exercised the utmost care consistent with the nature and extent of its business, and that no inference of negligence remained in the case.

The argument of petitioner on page 19 of its brief proceeds on the assumption that defendants were required to furnish not only evidence sufficient to rebut petitioner's alleged prima facie case, but also a complete water-tight explanation of everything which might possibly have affected the operation of the bridge, otherwise a presumption of negligence remained. This is not the rule in Illinois under the cases previously cited. Under the Illinois rule the detailed evidence introduced by petitioner in this case had already eliminated the doctrine of *res ipsa loquitur* at the end of petitioner's case. Neither is this the rule under the case of *Sweeney* v. *Erving,* 228 U. S. 233, which has had wide influence and has been followed in many

states. (See Annotation, 53 A. L. R. 1494.) Under the rule in the *Sweeney* case the doctrine of *res ipsa loquitur* calls for an explanation but does not necessarily require one, and certainly does not require the kind of exhaustive rebuttal claimed by petitioner.

It is therefore respectfully submitted that in the present case the trial court properly refused to instruct the jury on *res ipsa loquitur* as requested by petitioner. The refusal to give this instruction raises no question calling for review by this court, because (a) this case turns entirely upon its particular facts, and no principle of general application would result from a decision thereof by this court which would add anything to the doctrine already clearly stated in *Sweeney* v. *Erving*, 228 U. S. 233; (b) the Court of Appeals correctly followed the Illinois law in holding that the detailed evidence in this case caused the presumption arising from the doctrine of *res ipsa loquitur* to vanish entirely; and (c) the Court of Appeals correctly applied the Illinois law in holding that the most probable inference or inferences from the facts in this case did not indicate negligence of defendants, and therefore the said doctrine was not applicable. This record shows that petitioner not only produced detailed evidence of the actual occurrence, but might easily have produced far more evidence which it apparently did not care to have in the record. This case therefore furnishes no precedent for the situation where plaintiff is without information as to the cause of his injury, which is the only situation adapted to the application of the doctrine of *res ipsa loquitur*.

II.

Petitioner's Instruction No. VII Was Erroneous and Was Properly Refused.

In Point IV of its Brief (Pet. 23-24), Petitioner argues that its Instruction No. VII on the doctrine of *res ipsa loquitur* was correct and should have been given as requested.

Even though it be conceded for purposes of argument that on a record differing from that here presented the doctrine of *res ipsa loquitur* might have applied in this case, the instruction as tendered was erroneous on this record under both Federal and Illinois decisions for the following reasons:

1. The requested instruction ignored the credible, undisputed evidence, which had narrowed the inquiry to a question of negligence in the failure of a particular cotter key. The basis of this objection is well summarized by the Court of Appeals as follows (R. 848):

> "By plaintiff's proof, the only thing to which negligence could be attributed was definitely fixed, and we think that any negligence in connection therewith must be treated as specific rather than general. The doctrine, however, raises an inference of general negligence with respect to the instrumentality (the bridge). In the instant case, its application must embrace any and all negligence which might be responsible for the failure of the bridge to rise. We are of the opinion that when a plaintiff, by pleading or proof, eliminates a portion of elements upon which general negligence might be inferred, the reason for the rule fails. To hold otherwise is to permit the indulgence of a false inference—one which could not exist consistently with plaintiff's proof."

The requested instruction should have been based upon all the credible undisputed evidence, and should have confined the jury to that evidence. The instruction in *Inland*

& Seaboard Coasting Co. v. *Tolson,* 139 U. S. 551, was so confined, and that is the chief distinction between the Tolson case and the present one. In the present case, instead of including in the instruction the undisputed fact that the failure was due solely to the absence or failure of a cotter key, the instruction hypothesized a general failure in inspection and maintenance, and left the jury to draw any inference it wished from such alleged general failure.

2. The requested instruction was erroneous because of its use of the term "prima facie," which is ambiguous, and likely to mislead a jury.

People v. *McCurrie,* 337 Ill. 290, 298; 169 N. E. 214, 217.

People v. *Sikes,* 328 Ill. 64, 75; 159 N. E. 293, 297.

Johnson v. *Pendergast,* 308 Ill. 255, 264; 139 N. E. 407, 410.

In the *McCurrie* case the court said, at 337 Ill. 298, 169 N. E. 217, "This court has repeatedly condemned the practice of giving instructions containing the words 'prima facie' as an abstract term." The same viewpoint was taken in the case of *McAdams* v. *U. S.* (C. C. A. 8th), 74 Fed. (2d) 37, 40.

3. The requested instruction was erroneous because under the law of Illinois it is error to instruct the jury on what constitutes a prima facie case after contrary evidence has been introduced. This principle was applied to a *res ipsa loquitur* instruction in the case of *Bollenbach* v. *Bloomenthal,* 341 Ill. 539, 542; 173 N. E. 670, 671, and the other Illinois cases cited at pages 8 to 9 of this brief. The same principle is applied generally by the Illinois courts in negligence cases.

People v. *Pederson,* 248 Ill. App. 462.

Beard v. *Haskell Park Bldg. Corp.,* 248 Ill. App. 467.

Wolf v. *Pedian,* 251 Ill. App. 564.

Riddle v. *Mansager,* 254 Ill. App. 68.

In *Inland, etc. Co.* v. *Tolson*, 139 U. S. 551, there was no evidence contrary to the strong prima facie case made by plaintiff's proof, and consequently the Tolson case is entirely consistent with the views of the Illinois courts. In our case the undisputed evidence proved that the bridge did not fail to open because of negligence in maintenance or inspection.

4. The requested instruction was erroneous because it placed an excessive burden of rebuttal on defendants. The principle laid down in *Sweeney* v. *Erving*, 228 U. S. 233, 240, that in a *res ipsa loquitur* case the facts of the occurrence warrant but do not compel an inference of negligence, is inconsistent with the burden placed upon defendants under the tendered instruction to rebut plaintiff's prima facie evidence. This burden of rebuttal is just as inconsistent with the rule laid down by the Illinois Supreme Court in *Bollenbach* v. *Bloomenthal*, 331 Ill. 539, 542; 173 N. E. 670, 671, since under the Illinois rule that the introduction of contrary evidence causes the presumption arising under *res ipsa loquitur* to vanish, there obviously can be no duty to rebut plaintiff's case, but merely a duty to introduce some contrary evidence for the jury's consideration.

In summary we submit that when both parties contend and concede that the bridge failed to open because of the failure of the cotter pin, there is no basis in the record for a *res ipsa loquitur* instruction based on inspection and maintenance of the bridge. If such an instruction should be given at all, it must be based on the cotter key that failed. The instruction tendered was in conflict with the undisputed evidence, and it was therefore erroneous. It was further erroneous because of the excessive burden of rebuttal it placed on respondents, and because of the errors in form which we have heretofore pointed out.

III.

The Trial Court Is Under No Independent Duty to Prepare a Correct Instruction Where a Request Is Defective.

Petitioner has argued (Pet. 24-25) that if the instruction tendered by it on *res ipsa loquitur* was defective, then the trial court should have modified it.

We submit that petitioner is not now in a position to make this argument because the trial court confined his ruling to the Instruction No. VII as submitted by petitioner, and petitioner did not ask that the trial court correct the instruction, nor did the trial court rule on this latter point. Reference to the record (R. 561, 597-600) will show that the trial court refused to give instruction No. VII, and that petitioner asked leave to prepare a corrected instruction, but petitioner did not obtain a definite ruling from the court as to whether it might submit such a corrected instruction. The court merely said that he would give further thought to No. VII, and that he was very much doubtful of giving the substance of the instruction in any event (R. 600). Although the court was thereupon adjourned for the luncheon period, no corrected instruction was submitted by petitioner, nor did petitioner obtain any further ruling on the point. In petitioner's motion for new trial no error was alleged in any refusal to modify the instruction (R. 784-792), but the only error urged was the failure to give it (R. 786, point 9). Moreover, the trial court was misled throughout the trial by the failure of petitioner to rely on the doctrine of *res ipsa loquitur* (R. 371), as shown by the statement of the trial court in ruling on the motion for a new trial (R. 794).

This conduct of petitioner was not in accordance with the spirit or letter of the Federal Rules of Civil Procedure. Rule 46 requires that a party make known to the court the action he desires the court to take. Rule 51 provides that

no party may assign as error the failure to give an instruction unless he objects to such failure before the jury retires. Petitioner did not request the court to modify or correct said instruction and it ought not be heard to complain of the failure of the court to do what the court had not been requested to do.

Furthermore, even though the point had been properly presented, there is no such duty on the trial court as petitioner claims. The Circuit Court of Appeals well said, in summarily disposing of this contention (R. 852):

> "We do not think it necessary to discuss this contention. The weight of the authority is to the effect that a court is under no independent duty to supply correct instructions where requests are defective. *Phoenix Railway Co.* v. *Landis*, 231 U. S. 578; *Stewart* v. *Capital Transit Co.*, 108 F. (2d) 1, 3 [certiorari denied 309 U. S. 657]; *Mansfield Hardwood Lumber Co.* v. *Horton*, 32 F. (2d) 851."

The cases cited by petitioner do not support petitioner's contention.

The case of *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, is chiefly relied upon by counsel for petitioner in support of their point. The question presented there was whether the Arizona Constitution, which provided that the defense of contributory negligence was one for the jury, prevented a Federal Court in that State from directing a verdict for the defendant. In deciding that the Arizona Constitution had no such effect the Court used the phrase quoted by counsel that a federal judge was not a mere moderator. The case does not support counsel's point.

Likewise, the case of *St. Paul F. & M. Ins. Co.* v. *Bachmann*, 285 U. S. 112, gives petitioner no support on this point. In that case incorrect instructions were submitted and given by the trial court on behalf of the plaintiff. On other issues the defendant failed to submit any proper instructions. The Supreme Court pointed out that the fail-

ure of the defendant to submit proper instructions did not prevent it from objecting to erroneous ones given by the court at the instance of the plaintiff. The court at no point, directly or indirectly, indicated there was any burden on the trial court to independently prepare instructions for the defendant. The total failure of the Supreme Court in this opinion to point out that there was such a burden indicates that no such duty exists.

The trial court was not obligated to correct a tendered instruction that was erroneous in form or substance, nor to give a correct instruction in place of a tendered instruction erroneous in either form or substance.

Conclusion.

The present case is the familiar one in which a disappointed party hopes that by pursuing appeals to the limit it may succeed in convincing an appellate court that some error has occurred which would justify its having another day in court. The trial of the present case lasted six weeks. The only error which petitioner has found to present to this court is the refusal of one instruction. The jury found for the respondents. The trial court ruled against petitioner on motion for a new trial. The Circuit Court of Appeals, after careful consideration of the case, has affirmed the judgment. There is nothing in the facts of the present case which would warrant review by this court.

This case does not present the situation where an injured person must have the benefit of the doctrine of *res ipsa loquitur* or be denied relief. The facts were open to petitioner and were developed by it as fully as it saw fit to do.

It is therefore respectfully submitted that certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 234

OMAHA PACKING COMPANY,

Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 234

OMAHA PACKING COMPANY,

Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI.

I.

Statement of Case.

Respondents' criticisms of petitioner's statement of the case are generally differences in construction of the record and most of them are of no consequence on the question of whether certiorari should be granted. However, several of respondents' statements are inaccurate.

Respondents incorrectly accuse petitioner (p. 2*) of taking a different position in its petition than in its brief

*NOTE: Pages refer to respondents' brief, unless otherwise noted.

in the Circuit Court of Appeals with respect to the cause of the failure of respondents' drawbridge to rise. The statement from petitioner's earlier brief quoted by the Circuit Court of Appeals (R. 844) and requoted by respondents (p. 2) is entirely consistent with the statement in the petition. Petitioner has tried, in the Circuit Court of Appeals and in the petition, to draw a distinction between proof on the one hand of the physical or mechanical cause of an accident and proof on the other hand of the human conduct, which alone is the criterion of negligence, producing the physical cause.

Respondents seek (pp. 3-4) to give the impression that petitioner misled the trial court as to its reliance on the rule of *res ipsa loquitur*. The trial judge was not misled on this point. While petitioner's counsel told the trial court (R. 371) that the term "*res ipsa loquitur*" had not been used in bridge cases, he stated in full the basic principles of that rule, asserted petitioner's reliance on these principles, and stated that he did not think the name had any magic (R. 371). When the requests for instructions were discussed by the trial judge and counsel, the trial judge, in referring to petitioner's requested instruction No. VII, said, "Of course, this instruction is designed to invoke the rule of *res ipsa loquitur*," (R. 598), and the colloquy on that page of the Record shows that petitioner was contending then, as now, that it was entitled to rely on *res ipsa loquitur* until respondents showed why the cotter key was missing.

Respondents' statement (p. 4) that the failure of the bridge to open promptly was immaterial because the fireboat could not have arrived before 3:51 p. m. and that at that time the fire had already spread to petitioner's plant, is based upon testimony that the photographs, defendants' Exhibits P, R and S, were taken between 4:01 and 4:06 p. m. Respondents, however, neglected to state that the

time at which these photographs were taken was disputed and is strongly contradicted by the large group of witnesses referred to in the second paragraph of the footnote on page 4 of their brief. Ten firemen testified that the fireboat could have prevented the fire spreading to plaintiff's plant if it had arrived before the wooden pens caught fire (R. 76, 92, 96-7, 173, 178, 181-2, 188-9, 229, 245 and 274) by keeping the wooden pens wetted down (R. 76, 174, and 96), by laying down a curtain of water between the burning elevator and the pens (R. 83, 96 and 174), or by knocking down the wooden pens with the streams from its turret nozzles (R. 76, 83). Three others testified that the fireboat would have been ineffective to prevent the spread of the fire (R. 442-3, 470, 508-9).

Another of respondents' criticisms is misleading. They say (p. 5) that it is not true that there is no evidence in the entire Record that the missing cotter key, or broken fragments of it, were found when the lever box was opened or immediately thereafter. They quote the testimony of Chichocki (R. 165) that he saw a cotter key on the desk in the custody of Mr. Preston, after the bridge failed to rise. But respondents failed to inform the Court that, on cross-examination, Chichocki stated that he did not know where Mr. Preston got the cotter key (R. 170), and that respondents' counsel took the position that there was no evidence that this cotter key had ever been in the bridge control device (R. 598). We reiterate that there is no evidence in the record as to the cotter key which was missing from the control device.

However, these matters go more to the merits of the case than to the question of whether the opinion of the Circuit Court of Appeals is such that this Court should grant a writ of certiorari.

II.

The Question Before This Court at This Time.

The question now before this Court is whether it should grant certiorari because the Circuit Court of Appeals erroneously applied the local and federal law to certain points in this case. Respondents' "Opposition to Petition for Certiorari" is the sort of argument that would be appropriate if this Court had granted the petition for certiorari and was hearing the case on its merits. Their approach to the petition is typified by the intimation (p. 2) that "the grounds of the Court of Appeals holding are of course immaterial, if its decision was correct," and by the statement (p. 5) that the only question before this Court is whether the trial court committed reversible error when it refused to give the "broad and general *res ipsa loquitur* instruction tendered by the petitioner." Respondents constantly endeavor to lead the discussion away from the Appellate Court's opinion, the errors in which are the basis for the allowance of the writ of certiorari in this case, and to discuss the merits, which petitioner believes cannot fairly be done within the limitations imposed on petitions for certiorari.

III.

The Illinois Law as to the Applicability of the Doctrine of Res Ipsa Loquitur.

Respondents' statement (pp. 7-9) as to what evidence under Illinois law will deprive a plaintiff of the right to rely on the doctrine of *res ipsa loquitur*, is based on dicta in *Bollenbach* v. *Bloomenthal*, 341 Ill. 539 (holding that *res ipsa loquitur* does not apply to a malpractice case), and in *O'Rourke* v. *Marshall Field & Co.*, 307 Ill. 197 (affirming a

judgment for a plaintiff who alleged and proved specific negligence and certain Illinois Appellate Court decisions. Respondents did not discuss or attempt to distinguish the cases relied on by petitioner (Pet., p. 14), namely, *Chicago City Railway Co.* v. *Carroll*, 206 Ill. 318, and *Chicago City Railway Company* v. *Barker*, 209 Ill. 321, which we believe are the only square decisions in the Illinois Supreme Court on this point, and *Masten* v. *Cousins*, 216 Ill. App. 268.

In the *Carroll* case a passenger in one of defendant's street cars obtained a transfer and alighted from one car for the purpose of changing cars. While walking beside the car from which he had just alighted, the trolley pole fell from that car, striking and injuring him. It should be noted that the precise physical cause of the accident was shown, namely, the fall of the trolley pole onto the plaintiff's head. What was not clearly shown was whether the fall of the trolley pole was due to some negligent act on the part of defendant. In disposing of the argument that there was no evidence showing specific negligence, the Supreme Court of Illinois said (206 Ill. at p. 324):

> "*Appellant contends* that as certain counts in the declaration alleged that the car was not properly inspected, and that other counts alleged that the bolts and connections of the trolley-pole were rusty and worn, *these were specific charges of negligence and there was no proof in the record to support them.* Appellant, in its argument, seems to overlook the fact that the declaration contained six counts, and that in at least three of them there was no specific negligence charged. *But if its contention was sound, as we think it is not*, as applied to the counts charging specific negligence, it could not be applied to the counts charging general negligence. Touching this same objection, which was made in the *Cotton case, supra*, this court said (p. 495): 'But it seems to be contended that, even admitting that a presumption of negligence arises from mere proof of the plaintiff's injury and its cause, it does not follow that there is

any presumption of the specific negligence alleged in the declaration. Even if it be admitted that the presumption is one of negligence generally, and not of any specific negligence, we think it sufficient to throw upon the defendant the burden of rebutting the specific negligence alleged. But the circumstances of the injury do, in our opinion, give presumptive evidence of at least the specific negligence charged in the first count of the declaration. That charge, as we have seen, is very general, and consists of negligently running and operating its road and the cars propelled thereon.' The *first* count of the declaration charges that appellant 'so carelessly and negligently propelled and managed said car and trolley-pole that said trolley-pole broke away from said car and fell and hit plaintiff upon the head.' The *fifth* count charges that appellant 'so carelessly and negligently managed and operated said Wentworth avenue car, and trolley-pole attached thereto, that said trolley-pole fell and hit plaintiff upon the head.' The *sixth* or additional count charges that appellant 'carelessly permitted plaintiff to be hit upon the head by said trolley-pole.' Applying the rule as announced in the above case, and as we think it is generally recognized, there can be no doubt but that the evidence in behalf of appellee was sufficient to cast upon appellant the burden of rebutting the negligence alleged in these counts." (Italics ours.)

A careful analysis of the italicized language of the court in the above quotation will show that when the court said, "But if its contention was sound, as we think it is not, as applied to the counts charging specific negligence * * *" the court can only mean that there was some evidence to support the counts charging specific negligence. When the court then says that this contention could not be applied to the counts charging general negligence, the court must mean first, that it believed the evidence would have justified a finding for the plaintiff on the counts charging specific negligence, and second, that even if the evidence was not sufficient to prove specific negligence, the attempt

to do so did not prevent plaintiff from relying upon the rule of *res ipsa loquitur* as to the counts charging general negligence. In short, the *Carroll* case is a decision by the Supreme Court of Illinois that the attempt to prove specific negligence does not, in and of itself, deprive a plaintiff of the right to rely upon the rule of *res ipsa loquitur*.

To the same effect is the case of *Masten* v. *Cousins*, 216 Ill. App. 268, in which it was held that there was evidence to go to the jury on the doctrine of *res ipsa loquitur* and also upon a charge of specific negligence. The foregoing decisions, together with the *Barker* case (discussed *infra*, p. 14), establish the law of Illinois at variance with the opinion of the Circuit Court of Appeals in this case.

Respondents then contend (p. 9) that if the mere introduction of such detailed and undisputed evidence as the absence of the cotter key was not sufficient to eliminate the doctrine, "it is still true that negligence of defendants was not the more probable conclusion from all the evidence, and the doctrine therefore had no application."

On principle, this should not be the law, as shown on pages 21-22 of petitioner's original brief. The Illinois cases cited by respondents (p. 10) are not in point. *Chicago & E. I. Railroad Co.* v. *Reilly*, 212 Ill. 506 was not a *res ipsa loquitur* case, but one involving a measure of proof by circumstantial evidence, and cites in support of its rule cases (*Lewis* v. *Flint, etc., R. Co.*, 54 Mich. 55, *Mitchell* v. *Chicago, etc., R. Co.*, 51 Mich. 236) from one of the two jurisdictions (Michigan and South Carolina) which do not recognize the rule of *res ipsa loquitur*.

In *Kraus* v. *Becker, Ryan & Co.*, 265 Ill. App. 525, the doctrine of *res ipsa loquitur* was inapplicable, for the reason which Judge Friend pointed out, viz., that there was no showing of the physical cause of plaintiff's injury. The language in that opinion upon which respondents un-

doubtedly rely does not refer to the inference of negligence under *res ipsa loquitur*, but to the inference as to the physical cause of the injury. This is made clear by the following quotation (265 Ill. App. 533):

> "In well considered cases resting upon the application of the doctrine of *res ipsa loquitur*, as tending to establish prima facie evidence, and where liability was upheld, it will be invariably found *that in every instance there was an essential element present, that is proof of the existence of the cause or thing which was alleged to have been the negligent act which produced the injury*, or proof of such facts from which the existence of such cause or thing constituting the alleged negligent act was the only reasonable inference that could be properly drawn." (Italics ours.)

That the *Kraus* case turned on the absence of sufficient proof of the instrumentality which was the physical cause of the injury is confirmed by the discussion in the *Kraus* case of *Benedick* v. *Potts*, 58 Md. 52. In the *Potts* case, plaintiff, a passenger on defendant's roller-coaster, was found unconscious in one of defendant's tunnels. There was no evidence of the agency causing the injury. The Maryland Court refused to apply *res ipsa loquitur*, and as quoted by Judge Friend (265 Ill. App. at 533), said:

> "It (*res ipsa loquitur*) permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury."

It is clear that when the Court in the *Kraus* case is talking about the most reasonable inference, it is talking about the sufficiency of circumstantial evidence to prove the physical cause of the injury—an entirely different thing from *res ipsa loquitur*.

Beckwith v. *Boynton*, 235 Ill. App. 469, does not support respondents' contention (p. 9) that "negligence of defendant must be the more probable conclusion from all the facts in evidence, otherwise the doctrine of *res ipsa loquitur*

does not apply." That was a malpractice case, and the court refused to apply the doctrine of *res ipsa loquitur*, because the thing causing the injury was not shown to be under the defendant's control (235 Ill. App. at 481-483). So the court in that case was applying the test of the sufficiency of evidence under the law relating to circumstantial evidence, not *res ipsa loquitur*.

Respondents' entire argument on this point is fallacious because it fails to recognize the difference between *res ipsa loquitur*, on the one hand, and proof by circumstantial evidence on the other. Many courts have been confused on this point. The difference is forcefully expressed in a note in 22 A. L. R., p. 1471, as follows:

> "* * * *the lack of evidence*, direct or circumstantial, *indicating negligence* on the part *of the defendant as the responsible human cause of the particular accident* in question, *is* not only *not fatal to the applicability of the rule of res ipsa loquitur* in its strict and distinctive sense, as *distinguished from* the principle, with which it is often confused, that *negligence* may be *established by circumstantial evidence*, but furnishes the occasion and necessity for invoking the rule in that sense." (Italics ours.)

This distinction has been adverted to in

Plumb v. *Richmond Light & R. Co.*, 233 N. Y. 285, 135 N. E. 504, 505.

Hepp v. *Quickel Auto Co.*, 37 N. M. 525, 25 P. (2d) 197, 199, 200.

North Memphis Savings Bank v. *Union Bridge, etc. Co.*, 138 Tenn. 161, 196 S. W. 492, 496.

Memphis Street Railway Co. v. *Stockton*, 143 Tenn. 201, 226 S. W. 187.

The opinion of the Circuit Court of Appeals in this case depends on and perpetuates this very fallacy, and this fact furnishes a strong reason for the granting of certiorari to correct this error.

The other cases cited by respondents (p. 10) are not Illinois cases, and, of course, do not state the law of Illinois which is applicable to this case, so far as the substantive law is concerned.

Respondents then take the position that if a latent defect was the cause of the cotter key being missing (entirely an assumption on the part of respondents), then respondents would not be liable, and they cite (pp. 12-13) but do not discuss, twelve cases in support of this proposition, none of which are in point. All may be distinguished for the reasons set out in Appendix A, attached to this brief.

Respondents then refer to *Buckland* v. *N. Y. N. H. & H. R. Co.*, 181 Mass. 3, as being the case "closest on the facts" (p. 13) to the case at bar. That case, however, is to be distinguished from the case at bar, first, because there was proof that the failure was due to a break in the vital pin, whereas, in the instant case, the pin was only shown to have been missing and its absence was not explained; and second, the break in the pin was due to a hidden defect which could not have been discovered by inspection, whereas, in the case at bar, assuming a break in the cotter key, there was no showing what the nature of the break was, or whether the defect was such that it could not have been discovered on inspection. On the other hand, the recent case of *Churchill* v. *Baltimore & Ohio R. Co.*, 30 F. Supp. 792, is directly in point. In that case the evidence showed that the rigging underneath a railroad car had fallen, due to the absence of a cotter key, and the court there held that merely to show that the cotter key is missing, is not sufficiently specific proof to prevent the application of the doctrine of *res ipsa loquitur*.

IV.

Petitioner's Requested Instruction No. VII Was Not Erroneous in the Respects Stated by Respondents.

(1) Respondents criticize (p. 15) petitioner's requested Instruction No. VII as not including all the credible undisputed evidence. But the requested instruction was not a binding or mandatory one directing a verdict if the jury found certain facts. Such an instruction, of course, must include the credible and undisputed evidence, but in this case the requested instruction merely undertook to tell the jury what facts would justify (not compel) an inference of negligence unless upon the whole evidence such prima facie evidence is rebutted (R. 536). It did not authorize the jury to ignore any credible evidence. It was clearly applicable under the words of the complaint which asserted negligence in general terms, where, as here, the responsible human cause, as contrasted with the physical or mechanical cause of the failure of the bridge to rise was not shown.

An Illinois case answering respondents' criticisms in this respect is *Chicago Union Traction Co.* v. *Newmiller*, 215 Ill. 383. There the evidence showed that the plaintiff was a passenger upon an electric street car, eastbound; that it was a long, closed car with seats running lengthwise; that the plaintiff sat at the extreme rear end of the left hand side; that there were a number of other passengers in the car; that the controller of the car was located on the front platform, close to the dash-board; that while running at the rate of six or seven miles an hour there was a sudden flash and noise from the controller, and flames shot out of it to a height of five or six feet; that there was a loud explosion; that the passengers, including the plaintiff, rushed toward the rear platform and the plaintiff was pushed off and fell to the pavement, injuring her. *Although*

the evidence localized the cause of the trouble in the controller of the street car, the Court did not, in its instructions, confine possible inferences of negligence to those in connection with the controller, but allowed a general inference of negligence on the part of the defendant from the mere fact of the explosion and the ensuing panic in the car. The Court's instruction on this point was as follows (215 Ill. at 388):

> "'The court instructs the jury that if you believe and find, from the evidence, that the plaintiff was a passenger on one of defendant's cars, and while such passenger she was in the exercise of ordinary care for her own safety, an explosion occurred on said car, by reason of which a panic was caused among the passengers in said car, in consequence of which the plaintiff, without fault on her part, was pushed from said car and thereby injured, then the plaintiff has made out a *prima facie* case of negligence against the defendant, and this places upon the defendant the burden of rebutting that presumption by proving that the explosion could not have been prevented by all that human care, vigilance and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road.'"

There was a verdict and judgment for the plaintiff. On appeal the judgment was affirmed, and the above instruction approved.

(2) The use of the words "prima facie" is relied on (p. 16) as a justification for the refusal of the requested instruction, and three Illinois cases are cited by respondents to uphold this criticism, but a Federal judge in giving instructions is not bound by a state court's ideas of terminology or diction. This is especially true where the same state court has not only criticized, but approved. the term "prima facie." In the case of *Leideck* v. *City of Chicago*, 248 Ill. App. 545, 558, the Illinois Appellate Court held that the words prima facie have been a part of the English language for 500 years.

And regardless of the criticisms of the use of the words "prima facie" by the Illinois Supreme Court in criminal cases, it has approved the use of such words in tort cases. Thus in *Chicago & Alton R. R. Co.* v. *Esten,* 178 Ill. 192, 198, the Supreme Court of Illinois says:

> "The court gave an instruction asked by the plaintiff which followed the statute, and informed the jury that if they believed, from the evidence, the fire was communicated from the locomotive engines used by defendant upon its railroad, that fact should be taken by them as full *prima facie* evidence to charge the defendant with negligence. The instruction was substantially the one given in *Louisville, Evansville and St. Louis Consolidated Railroad Co.* v. *Spencer,* 149 Ill. 97, and the objection made is, that the term '*prima facie*' should have been so modified and explained that the average juror would comprehend and understand what was meant by it. In the case cited the instruction was held to be proper, and it was said that if, in the opinion of counsel for defendant, there was danger that its meaning might be misapprehended they should have offered an instruction for that purpose, which would undoubtedly have been given. In the first instruction given for the plaintiff in this case the subject is referred to, and it was conceded by that instruction that the defendant might overcome the *prima facie* case made by the proof of setting the fire. Webster's dictionary contains the term as English, and it is probably as well understood as a large share of the words and terms used, so that it cannot be said to be the introduction of a foreign language into an instruction."

And in the instruction approved in *Inland etc. Co.* v. *Tolson,* 139 U. S. 551, of which petitioner's requested instruction is a paraphrase, the words "prima facie" appear twice.

(3) Respondents next contend (p. 16) that "under the law of Illinois it is error to instruct the jury on what constitutes a prima facie case after contrary evidence has been introduced," and they cite *Bollenbach* v. *Bloom-*

enthal, 341 Ill. 539, and certain Illinois Appellate Court cases, most of which involve the liability of bailees. But the *Bollenbach* case holds (341 Ill. at 544-546) that *res ipsa loquitur* is not applicable in a suit against a dentist for malpractice, and so, of course, no *res ipsa loquitur* instruction should have been given. The Illinois law on the effect of an attempted explanation of a prima facie case is found in *Chicago City Ry. Co.* v. *Barker,* 209 Ill. 321. In that case a motorman on defendant's sand car fell off and the car, out of control, struck the wagon driven by plaintiff's intestate. The defendant made an unusual case and vigorously attempted exculpation from the prima facie case created by the doctrine of *res ipsa loquitur.* In discussing the legal effect of this effort the Supreme Court of Illinois said (209 Ill. at 327-328):

> "It was for the jury to say, whether the motorman fell from the car on account of an electric shock, which, he says, he received, or whether he fell off, as the result of his own conduct in looking back over the barrel without securing a sufficient hold upon some part of the car to prevent himself from falling off. Whether his statement was true, that an electric shock was the cause of his fall, was a matter to be determined by the jury. *The testimony, introduced by the appellant, was to the effect that there was no way, in which the electric apparatus could cause such a shock; that no person had ever heard of such an accident before; that the witness had run the car for three weeks, and during all the morning of that day without any accident, the accident having occurred about one o'clock; that the car was of the best and highest standard of construction; that it was inspected by expert workmen every night, and that any repairs, which were needed, were promptly made.*
>
> "The contention of the appellant is that, if it was necessary for it to rebut the *prima facie* presumption of negligence raised by the occurrence of the accident in the manner stated, it did so by showing that the motorman was thrown from the car by an electric

> shock, which the appellant was unable to anticipate or prevent, and that, therefore, it should not be held responsible, because the car was not in the control of anyone when it struck Eick's wagon. It was a question for the jury to determine, whether the explanation of the accident sufficiently rebutted the presumption in question. *The credibility of such rebutting evidence is held by the authorities to be a question for the jury.*" (Italics ours.)

And later in the same case the Court said (209 Ill. at 329):

> "As is said by the Appellate Court in their opinion deciding this case: 'in the case at bar, it was for the jury to consider whether the explanation offered by appellant relieved it from the presumption of negligence raised by the undisputed facts.'"

The above sentence must mean that the inference of negligence created by the rule of *res ipsa loquitur* may persist in spite of defendant's attempted explanation, and so, of course, the jury must be told of this inference. How could a jury consider the question stated by the Supreme Court of Illinois in the above quotation, unless it is informed by the judge's instructions as to the effect of plaintiff's prima facie case under the doctrine of *res ipsa loquitur*, as in the *Newmiller* case (215 Ill. 383)?

Other cases have been cited in plaintiff's petition (Pet., pp. 15-16) to the effect that where the facts of the case created an inference under the doctrine of *res ipsa loquitur*, the jury must be told this, so that the jury may see the facts against the defendant's attempted explanation.

(4) Petitioner's requested instruction No. VII imposed no excessive burden on the respondents. It laid down no standard differing from that imposed by *Sweeney* v. *Erving*, 228 U. S. 233. It simply told the jury that they might find negligence from certain facts constituting a prima facie case, unless on the whole evidence the prima facie evidence was rebutted, and this is the essence of the decision in *Sweeney* v. *Erving, supra*. Moreover, *Sweeney*

v. *Erving* cites (228 U. S. at 240) and relies on *Inland etc. Co.* v. *Tolson,* 139 U. S. 551, from which petitioner's requested instruction No. VII was paraphrased. If the instruction in the *Tolson* case had imposed too heavy a burden on the defendant, the Supreme Court would not have relied upon that decision in the *Sweeney* case.

V.

The Trial Court's Duty to Correct a Defective Instruction.

Respondents have denied that the case of *St. Paul F. & M. Ins. Co.* v. *Bachmann,* 285 U. S. 112, supports petitioner's contention that the trial court should have given some instruction on the subject of *res ipsa loquitur,* even though plaintiff's requested Instruction No. VII might have been defective in form. Respondents misinterpret the holding of that case when they say (pp. 19-20) that this Court at no point, directly or indirectly, indicated there was any burden on the trial court to independently prepare instructions for the defendant.

The fact is that that case was a suit on a fire insurance policy which contained a warranty against increase of risk (referred to as the "Increase of Hazard Warranty"), and a warranty against keeping gasoline on the premises (referred to as the "Prohibited Articles Warranty"). The evidence showed that a large amount of gasoline was kept on the premises in connection with a still run by plaintiff's tenant. The defendant submitted requests for instructions as to the Prohibited Articles Warranty, which were technically erroneous and were refused by the trial court. The trial court submitted the case to the jury without any instruction relating to the Prohibited Articles Warranty. A verdict for plaintiff was affirmed by the Circuit Court of Appeals, and on certiorari the Supreme

Court reversed the case. Mr. Justice Brandeis, speaking for the whole court, said, at 285 U. S. 118-119:

> "These instructions, while correct insofar as they bore upon the defense under the Increase of Hazard Warranty, were erroneous in respect to that under the Prohibited Articles Warranty. The fact that the defendant had incorporated errors of law in the instructions which it sought upon the second defense did not justify putting the case to the jury solely upon the first. Compare *Westchester Fire Ins. Co.* v. *Fitzpatrick*, (C. C. A. 6th) 2 F. (2d) 651, 654; *Sutherland* v. *Payne*, (C. C. A. 6th) 274 Fed. 360, 361; *Rothe* v. *Pennsylvania Co.*, 114 C. C. A. 627; 195 Fed. 21, 25; *Audubon Bldg. Co.* v. *F. M. Andrews & Co.*, 111 C. C. A. 92, 187 Fed. 254, 260."

These cases cited by the Supreme Court establish that when an instruction, though technically incorrect, is "sufficient to direct the mind of the judge to the legal principle" (*Sprinkle* v. *Davis*, 104 F. (2d) 487, 490) and no other instruction with respect to that legal principle is submitted, the trial court is required to give a correct instruction with respect thereto.

VI.

Conclusion.

Respondents argue (p. 20) to this Court that "The jury found for the respondents." But this Court and all Federal courts have recognized that the conclusive effect of a verdict is conditional on the correctness of the instructions under which the verdict is returned.

Delaware etc. R. Co. v. *Converse*, 139 U. S. 469, 476.

U. S. ex rel. Smith v. *Stewart*, 2 F. (2d) 936, 937, (Ct. App. D. C.).

U. S. v. *Delaware etc. R. Co.*, 218 F. 608, 610 (2 C. C. A.).

If petitioner's requested instruction No. VII should have been given, the fact that the jury returned a verdict against petitioner based on insufficient instructions, should not influence this Court.

We urge the Court to issue its writ of certiorari in this case to clear up the procedural confusion in the application of the rule of *res ipsa loquitur* which the opinion of the Circuit Court of Appeals in this case has only increased.

Respectfully submitted,

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APPENDIX A.

Grounds for Distinguishing Cases Cited by Respondents.

It is the Federal and Illinois law that the doctrine of *res ipsa loquitur* does not apply in a common law* action by a servant against the master.

Patton v. *Texas & Pacific R. Co.*, 179 U. S. 658, 663.
Drake Standard Machine Works v. *Brossman*, 135 Ill. App. 209, 222.

For this reason, and the additional reasons listed below, the cases cited by respondents (pp. 12-13) are not in point.

O'Hara v. *Brown Hoisting Co.*, 171 Fed. 394 (3 C. C. A.):

A master and servant case; *res ipsa loquitur* not involved.

Herricks v. *C. & E. I. R. Co.*, 257 Ill. 264:

A master and servant case. *Res ipsa loquitur* not applicable.

So. Bell Telephone Co. v. *Glawson*, 13 Ga. App. 520, 79 S. E. 488:

A suit for damages for failure to get through a telephone call to a physician. Complaint alleged specific acts of negligence which were not supported by the proof and *res ipsa loquitur* was not involved.

Grand Rapids, etc. R. Co. v. *Huntley*, 38 Mich. 537:

A carrier and passenger case but from a jurisdiction in which the doctrine of *res ipsa loquitur* is not the law; directly contrary on similar facts to *Chicago City Ry.* v. *Barker* (pp. 81, 82).

* Since the enactment of the Federal Employers Liability Act (U. S. C. 45: 51-59) in 1908, abolishing the defenses of negligence of a fellow-servant (*Jamison* v. *Encarnacion*, 281 U. S. 635, 639-640), and in certain cases, of assumption of risk in master and servant cases, the Federal Courts have applied the doctrine of *res ipsa loquitur* in such cases.
Leatham etc. Co. v. *Osby*, 79 F. (2d) 280, 284 (7 C. C. A.).

Siegel v. *Detroit, etc. R. Co.*, 160 Mich. 270, 125 N. W. 6:

A master and servant case; also from a jurisdiction which does not accept the doctrine of *res ipsa loquitur.*

Mooney v. *Beattie*, 180 Mass. 451, 62 N. E. 725:

A master and servant case; *res ipsa loquitur* not involved.

Reynolds v. *Merchants Woolen Co.*, 168 Mass. 501, 47 N. E. 406:

Another master and servant case; the Court distinguished the *res ipsa loquitur* cases on this ground and refused to apply the doctrine.

Shea v. *Wellington*, 163 Mass. 364, 40 N. E. 173:

Another master and servant case; *res ipsa loquitur* not involved.

Martin v. *Studebaker*, 102 N. J. L. 612, 133 Atl. 384:

Plaintiff was injured by the collapse of an automobile. Defendant automobile manufacturer proved that the wheel was bought from a reputable wheel manufacturer and that it was subjected to three inspections in defendant's own factory. The court decided the case on the analogy of master and servant cases and no question of *res ipsa loquitur* was involved.

Losee v. *Buchanan*, 51 N. Y. 476:

A boiler explosion damaged plaintiff's property adjoining. The Court said (51 N. Y. at 493):

> "The fact that defendants bought the boiler of reputable manufacturers was one of the facts tending to justification which the jury were bound to consider. It was not of itself a conclusive justification and the judge did not charge that it was."

Ardesco Oil Co. v. *Gilson*, 63 Pa. St. 146:

Another master and servant case. *Res ipsa loquitur* not involved.